

NOT FOR PUBLICATION

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

United States of America,)	
)	
Plaintiff,)	Civ. No. 2001-195
)	
v.)	
)	
Lucille Demaris-Ortiz, Claudio)	
Montero, Casear Isasis, and Anthony)	
Wilkins,)	
)	
Defendant.)	
)	

ATTORNEYS:

Anthony Jenkins, USAA, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Douglas Beevers, Esq.
St. Thomas, U.S.V.I.
For defendant Demaris-Ortiz

Steven A. Brusch, Esq.
St. Thomas, U.S.V.I.
For defendant Montero

Michael C. Dunston, Esq.
St. Thomas, U.S.V.I.
For defendant Isasis

George Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For defendant Wilkins

MEMORANDUM

Moore, J.

Defendants Lucille Demaris-Ortiz ("Demaris-Ortiz"), Claudio
Montero ("Montero"), Casear Isasis ("Isasis"), and Anthony

Wilkins ("Wilkins") (collectively "defendants") have filed several pretrial motions. The United States has conceded some of these motions and opposed the remainder. For the reasons set forth below, this Court will grant defendants' motions in part and deny the rest.

I. FACTS

According to the government, Demaris-Ortiz was staying in room 105 of the Mafolie Hotel in St. Thomas and believed to be in possession of large amounts of narcotics. On May 8, 2001, Montero was observed arriving at the Mafolie Hotel, where four other men, including Isasis and Wilkins, were in the vicinity of room 105. Twenty minutes later, Montero left the hotel with a single passenger, while Isasis and Wilkins remained behind and in possession of a large box. Isasis and Wilkins then entered a taxi with the box and traveled to Havensight. Police apprehended them as they proceeded to the cruise ships. A search of the box revealed six kilos of cocaine. Police subsequently approached Demaris-Ortiz at her room, where they discovered an additional eight kilos of cocaine after a consensual search. The defendants were then arrested for conspiracy to possess and possession with intent to distribute a controlled substance in violation of 21

U.S.C. §§ 841(a), 846. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

II. DEFENDANTS' MOTIONS

Three of the four defendants, Demaris-Ortiz, Montero and Isasis, have filed an array of pretrial motions, each joining the other's motions. Defendant Wilkins has not filed any motions of his own or adopted the other defendants' motions. These motions include: (1) a motion for a pretrial evidentiary hearing to determine the existence of a conspiracy; (2) a motion to reveal the identity of the government's informer; (3) a motion for preservation and production of tapes and notes; (4) a motion for disclosure of evidence that the government intends to offer under Rule 404(b); (5) a motion for disclosure of guideline sentencing information; (6) a motion to exclude the audio tapes from evidence at trial because the government has not provided a word for word translation of the tapes; and (7) a motion to compel government to disclose whether there has been any deals with any witness, and the criminal and drug use and addition records of such witnesses. As the government has conceded motions 2 and 3¹

¹ At the hearing on November 8, 2001, the parties agreed that, although the government has promised to preserve and produce evidence, it has not provided the defendants with the police officer's rough notes of the investigation. The government, however, is not obligated to turn over these rough notes. See *United States v. Ramos*, 27 F.3d 65, 70 (3d Cir. 1994) (requiring the preservation of rough notes but not the disclosure of such notes in all instances); *id.* at 71 ("[U]nless [a] defendant is able to raise at least a colorable claim that the investigator's discarded rough notes

and has noted that it will not introduce Rule 404(b) evidence at trial per motion 4 and the Magistrate Judge has denied motion 5,² I need only address joint motions 1, 6 and 7.

A. Motion for Pretrial Evidentiary Hearing

The three defendants requested a hearing to determine the existence of a conspiracy. Rule 801(d)(2)(E) of the Federal Rules of Evidence provides an exception to the hearsay rule to admit into evidence statements of a co-conspirator made during the course of and in furtherance of a conspiracy. FED. R. EVID. 801(d)(2)(E). Before the statement can be admitted, the court must determine whether the statement was in fact made during the course of and in furtherance of a conspiracy. See *Glasser v. United States*, 315 U.S. 60 (1942); FED. R. EVID. 104(a) ("Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).").

Due to the complexity of some conspiracies, it may be difficult, if not impossible, for the government to establish the

contained evidence favorable to [him] and material to his claim of innocence or to the applicable punishment -- and that exculpatory evidence has not been included in any formal interview report provided to defendant -- no constitutional error of violation of due process will have been established.") (quoting *United States v. Griffin*, 659 F.2d 932, 939 (9th Cir. 1981)).

² *United States v. Demaris-Ortiz*, Crim. No. 2001-195 (D.V.I. Sept. 5, 2001) (Order). This order also noted that the government will not introduce Rule 404(b) evidence. See *id.*

existence of the conspiracy and the participation therein of the co-conspirators before seeking admission of a co-conspirator's statements. See *United States v. Gambino*, 926 F.2d 1355, 1360 (3d Cir. 1991); *United States v. Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979). In these instances, the co-conspirator's statements can be conditionally admitted into evidence, provided the government establishes the existence of the conspiracy and each conspirator's participation therein before it closes its case. See, e.g., *Gambino*, 926 F.2d at 1360-61; *United States v. De Peri*, 778 F.2d 963, 981 (3d Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 245-47 (3d Cir. 1983); *In re Fine Paper Litigation*, 685 F.2d 810, 820-21 (3d Cir. 1982); *Continental Group*, 603 F.2d at 456. The difficulty with conditionally admitting a co-conspirator's statement subject to later connection is that, at the close of evidence, the court may determine that the prosecution failed to meet its burden of proof and one or more defendant could claim to have been prejudiced.

To alleviate this concern, the court of appeals for some circuits have conducted pretrial hearings, sometimes called "*James* hearings," to establish the existence of a conspiracy. See *United States v. Gonzalez-Montoya*, 161 F.3d 643 (10th Cir. 1998); *United States v. James*, 590 F.2d 575. This practice, however, is not the custom in this jurisdiction. The Third

Circuit Court of Appeals has never required the district courts to hold a *James* hearing and has cautioned that the procedure of conditionally admitting conspiracy evidence "should be carefully considered and sparingly utilized by the district courts." See *Continental Group*, 603 F.2d at 457; see also *Gambino*, 926 F.2d at 1360-61; *Ammar*, 714 F.2d at 245-47; *In re Fine Paper Litigation*, 685 F.2d at 820-21; *Continental Group*, 603 F.2d at 457.

Moreover, even those courts that encourage *James* hearings have not made such hearings mandatory. See *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001) (stating that the decision to hold a *James* hearing is left to the discretion of the trial judge); *Gonzalez-Montoya*, 161 F.3d at 649 (noting that courts are not required to hold *James* hearings). For these reasons, I will exercise my discretion to decline the invitation to hold a *James* hearing and will deny defendants' motion.

B. Motion to Exclude English Translation of Audio Tape

Defendants argue that the English translation of the government's audio tape is inaccurate and thus prejudicial, without, however, specifying what parts of the transaction are inaccurate. Without knowing where the problems lie, I cannot determine the admissibility of the translation at this time. As I have the discretion whether to admit a transcript of a recorded conversation into evidence, see *United States v. Pecora*, 798 F.2d

614, 631 (3d Cir. 1986), I will order an audibility hearing of the relevant audio tapes before the Magistrate Judge and retain the assistance of a court-approved translator to review the disputed portions of the translation. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 353 (9th Cir. 1995) (using a certified, independent interpreter to review the accuracy of translated transcripts). Defendants may proffer evidence on the disputed areas at this hearing and the government will have the opportunity to respond in kind. At the close of this hearing, the Magistrate Judge will make a preliminary ruling on the accuracy of the translation and report his recommendations to me.

C. Motion to Compel Disclosure of Witness Deals and Criminal/Drug History

The law is clear that the prosecution must not withhold impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence falls within the *Brady* rule."); *United States v. Brown*, 250 F.3d 811, 816 (3d Cir. 2001) (citing *United States v. Giglio*, 450 U.S. 150 (1972) ("The prosecution must . . . disclose evidence relevant to the credibility of crucial prosecution witnesses."); *Hollman v. Wilson*, 158 F.3d 177, 180 (3d Cir. 1998) ("[E]vidence of a government witness's prior criminal history is evidence which must be produced to the defense."); *United States*

v. *Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (holding that the government's failure to provide the defense with a witness's criminal history violated the *Brady* rule). As evidence of any deals with witnesses or the criminal and/or drug use history of a witness affects the credibility of a witness and could be the difference between a conviction or an acquittal, the government must disclose any such information it has in its possession.

III. CONCLUSION

This Court will deny defendants' motion for a pretrial evidentiary hearing on the existence of a conspiracy because they are not entitled to such a hearing, but I will grant their motion regarding the disclosure of any witness deals and other credibility and *Brady* evidence. In addition, I will order an audibility hearing before the Magistrate Judge to determine the accuracy of the translation of the audio tape. Finally, I will deny as moot those pending motions the government has conceded to.

ENTERED this 9th day of November, 2001.

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For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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For defendant Wilkins

ORDER

For the reasons set forth in the foregoing Memorandum of
even date, it is hereby

ORDERED that defendants' motion for a pretrial evidentiary hearing on the existence of a conspiracy (Docket Nos. 31, 39, and 70) is **DENIED**; it is further

ORDERED that defendants' motion for the disclosure of any witness deals or other witness credibility evidence (Docket No. 70) is **GRANTED**; it is further

ORDERED that defendants' motion to reveal the identity of the government's informant (Docket Nos. 35 and 39) is **DENIED** as **MOOT**; it is further

ORDERED that defendants' motion to compel the government to preserve and produce tapes and notes (Docket No. 29 and 39) is **DENIED** as **MOOT**; it is further

ORDERED that defendants shall file copies of the transcripts specifically delineating those portions they may claim to be inaccurate, inaudible or otherwise confusing to the jury by November 14, 2001, and simultaneously hand deliver copies to the government; it is further

ORDERED that the Magistrate Judge will conduct an audibility hearing on the specified portions of the audio tapes as soon as possible, keeping in mind the early December 2001 trial date, and will retain the services of a independent, court-approved translator to review the accuracy of the translations; it is further

ORDERED that both parties may present evidence at this hearing regarding the translation of the audio tapes; and it is further

ORDERED that the Magistrate Judge will, at the conclusion of this hearing, make a preliminary ruling on the translation with the assistance of the court-approved translator and will report his recommendation to the District Judge.

ENTERED this 9th day of November, 2001.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

**By: _____/s/_____
Deputy Clerk**

cc: Hon. R.L. Finch
Hon. G.W. Barnard
Hon. R.L. Resnick
Mrs. Jackson
Mrs. Trotman
Anthony Jenkins, Esq.
Douglas Beevers, Esq.
Michael Dunston, Esq.
George Hodge, Esq.
Stephen Bruschi, Esq.
Michael Hughes